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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1007

CHARLESTON COMMUNITY MEMORIAL HOSPITAL,
a Corporation (Appellant),
Petitioner,

vs.

DORRENCE KENNETH DARLING, II, a Minor, by His Father and Next Friend, Dorrence Kenneth Darling (Appellee),
Respondent.

ANSWER

To Petition for Writ of Certiorari.

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ANSWER

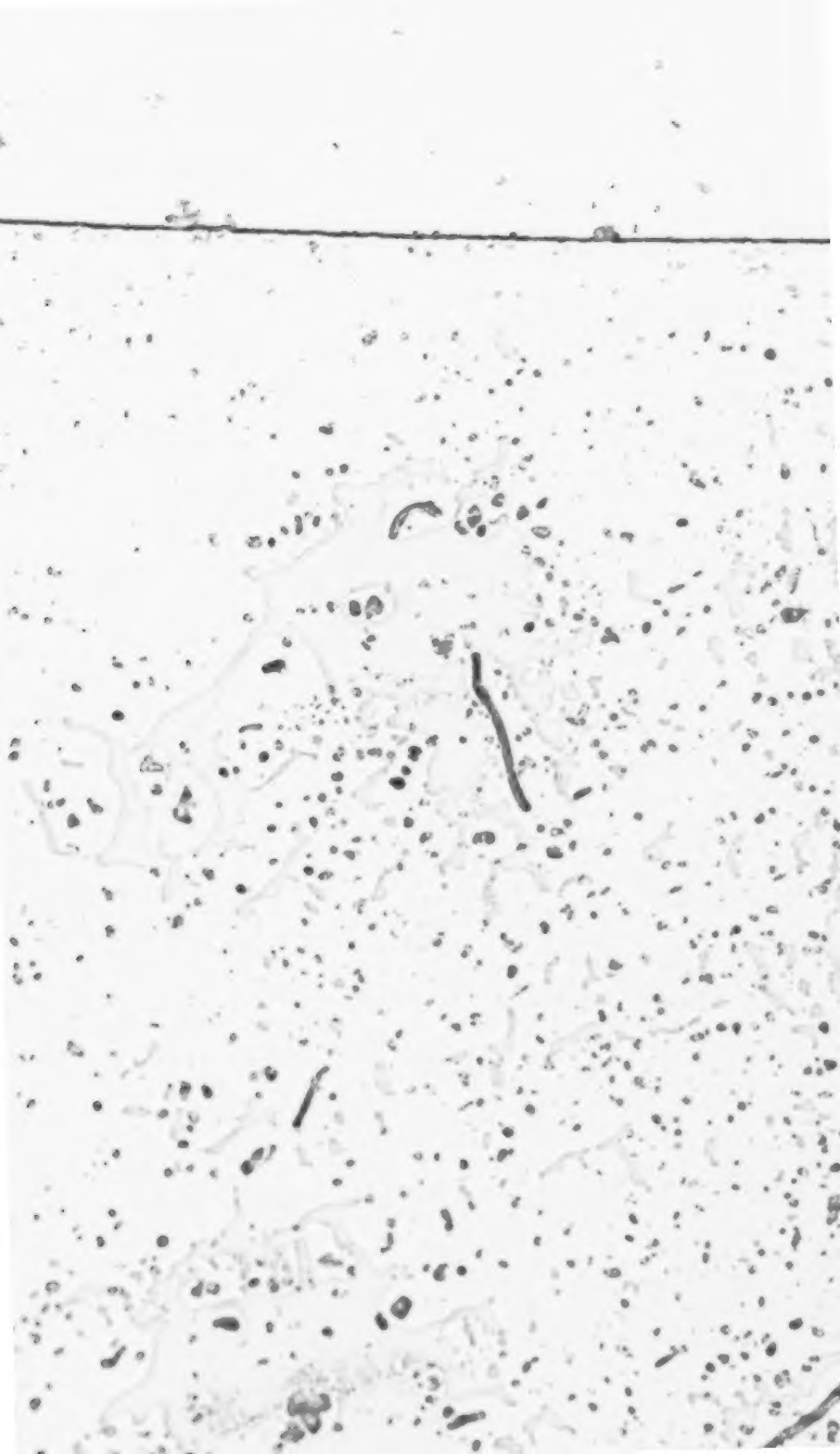
To Petition for Writ of Certiorari.

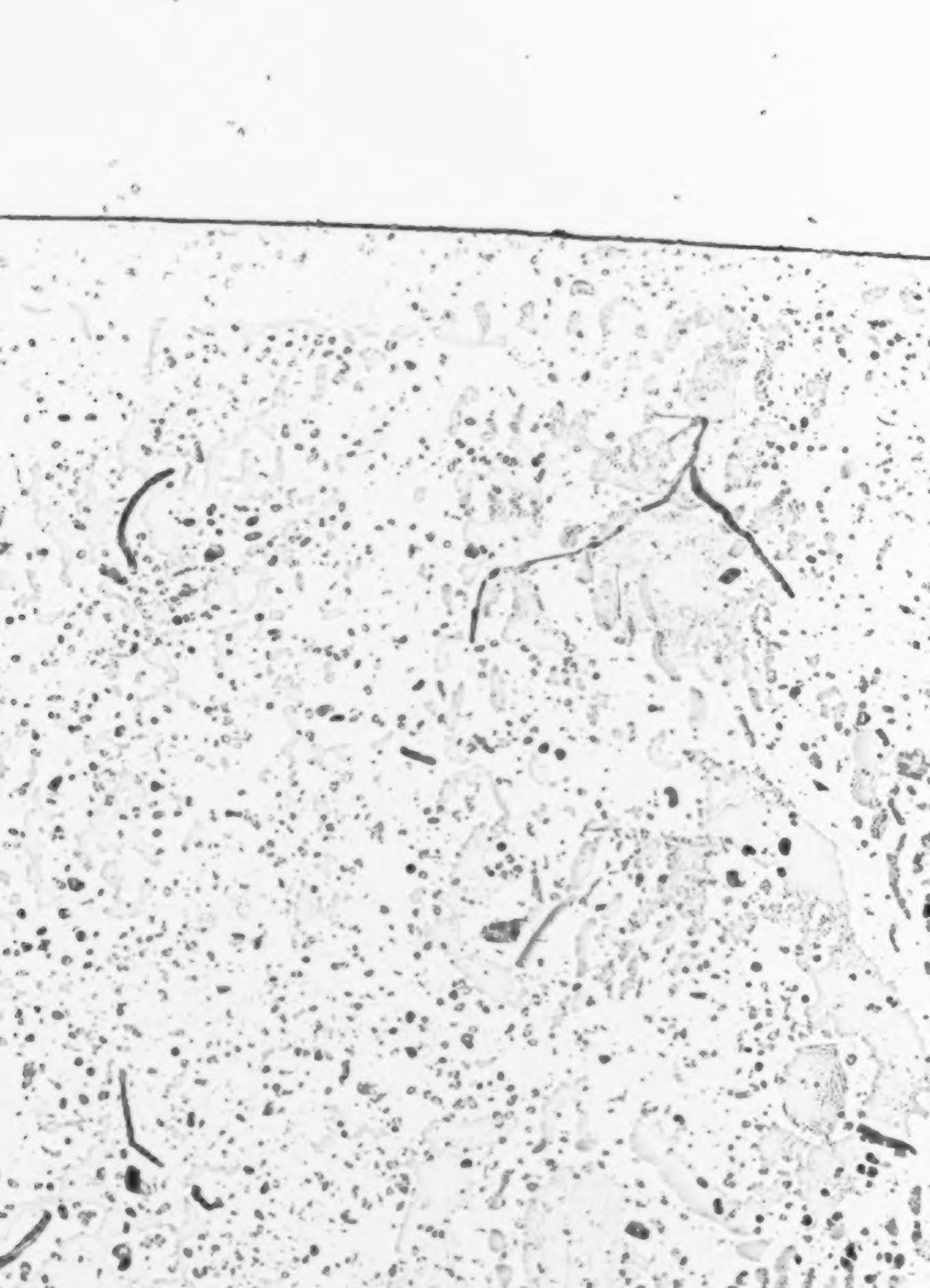
To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Now comes the Plaintiff-Respondent, by his attorney, and respectfully prays that the Petition for Writ of Certiorari be denied.

REASONS FOR DENIAL OF WRIT.

The basis assigned by Petitioner for the assumption of jurisdiction by this Court is that the Supreme Court of Illinois, for the first time, by its opinion deprives the Petitioner of property without due process of law. Later (p. 4) some reference is also made to the Medicare Act—but it is not clear as to whether such is being asserted as an additional ground of jurisdiction or not.





If said statute is relied upon, since the wrong in this case occurred upon November 5, 1960, it is clear that such statute could not affect the rights of the Respondent *ex post facto*. In addition, such statute was not pleaded nor presented in any manner in any of the state courts of Illinois and cannot, for the first time, be asserted in this Court.

As to the constitutional questions, it is fundamental that the record must show clearly that such point was raised at the earliest possible moment. Although the Petitioner states that a constitutional question arose for the first time by action of the Supreme Court, an examination of the pleadings and proceedings in this case show that this is patently inaccurate. If the Petitioner was deprived of property without due process of law, such occurred as a result of the verdict of the jury and entry of judgment by the trial court. However, no constitutional question was urged in the trial court either in the pleadings or in the post-trial motion. And the appeal was then pursued to the Appellate Court of Illinois, in which court no constitutional questions may be urged. Those cases in which any constitutional questions are to be asserted must go directly to the Illinois Supreme Court, or a waiver of any possible constitutional grounds results. There was no new or different action taken either by the Appellate Court or by the Supreme Court, since their actions were merely to affirm what had occurred in the trial court. At no time did the Petitioner assert in those reviewing courts, until the filing of its Petition for Rehearing, which action was clearly an afterthought—that any constitutional question was involved. If the basis for urging jurisdiction in this Court is that the defendant hospital will be deprived of money as a result of having to pay the judgment in question, then jurisdiction of this Court could be involved in every personal injury case and every other civil suit in which money damages are recovered by one person from another.

ARGUMENT.

To expand very briefly upon the reasons above set forth, the respondent was a patient in the hospital of the defendant. A plaster cast was applied to his broken leg which apparently constricted circulation; such was the testimony offered on behalf of the respondent. As a result of such constriction, necrosis developed and the leg had to be amputated.

The respondent, then a college student and a minor, brought suit against the hospital and the doctor for their joint neglect in the treatment of the plaintiff while a patient in said hospital, setting forth certain claimed derelictions. On the part of the hospital, failure to conform to those standards required of a licensed and accredited hospital were assigned. The trial lasted for two weeks. At no place in the pleadings of the defendant, nor during the trial of the case, did the hospital ever urge that any Federal statutory question existed or that it would be deprived of any constitutional rights by having to discharge any judgment which might be imposed upon it. The doctor, prior to trial, settled his aspect of liability for $40,000. The cause was submitted to a jury which returned a total verdict of $150,000. From this award the trial court subtracted the credit due to the defendant by reason of the payment by the physician, leaving a net judgment of $110,000. The defendant filed a post-trial motion exceeding seventy pages in length; again, no constitutional question was raised. The trial court, following consideration of said motion, denied it and an appeal was pursued by the defendant to the Appellate Court of Illinois for the Fourth District. Under Illinois Law, the taking of an appeal to that Court waives any constitutional questions, if any should be urged, Haymes v. Catholic Bishop of Chicago, 33 Ill. 2d 425, at 428, 429, 211 N. E. 2d 690, but no constitutional questions were urged.

Printed briefs were filed on behalf of the Petitioner urging, in substance, the grounds presented by the post-trial motion, none of which were related to any Federal question—not even a supposed deprivation of property without due process.

Following the consideration of briefs and oral argument, the Appellate Court affirmed the trial court, and granted a certificate of importance (at the request of Petitioner) to the Supreme Court of Illinois. Briefs were duly filed with said Court by Petitioner, such briefs being three in number on its behalf—an original brief, a reply brief, and a supplemental brief following oral argument. Upon none of these occasions was any Federal question presented or urged nor any constitutional question, whether under the State or Federal Constitutions. And when the Supreme Court of Illinois affirmed the judgment, there was nothing in its opinion which presented for the first time any question other than those questions which had theretofore been determined by both the trial court and the Appellate Court of Illinois.

In this Court the Petitioner states (p. 8):

> "Until the decision of the Supreme Court of Illinois was filed September 29, 1965, there was no Federal question. It was injected for the first time in that decision. * * * The decision of the Supreme Court of Illinois stated, in effect, that the nursing staff and the hospital administrator are required to practice medicine."

Our references either will be in the Appendix which constitutes a part of the Petition, which will be cited as (App. ...) or to the Abstract filed by Petitioner, in which the citations will be (Abst. ..). As to the assertion that the proper discharge of its duties would require it to practice medicine, this Petitioner presented its theory to the trial court by its tendered jury instructions 18,

19, 20, and 21, all of which were refused (Abst. 639, 640), although 23A, embracing such theory, was given (Abst. 635). Therefore, even if the rejection, in whole or in part, of the defense theory embodied in those instructions, deprived the Petitioner of property without due process of law, such occurred in the trial court, but the Petitioner did not at that time claim such action was unconstitutional. In fact, instead of asserting that the action of the trial court violated any constitutional rights of Petitioner, the hospital pursued its appeal to the Appellate Court of Illinois, thereby waiving any possible constitutional question, Haymes v. Catholic Bishop of Chicago, 33 Ill. 2d 425, 211 N. E. 2d 690. The Petitioner's theory is adequately discussed in the decision of the Appellate Court (App. 67-69). which states:

> "As to the defendant's refused tendered instructions referred to * * * numbers 18, 19, 20, and 21, were immaterial and irrelevant to the evidence and issues, and were all abstract in form. The defendant's theory of the case was adequately presented in its given instructions. And with regard to the defendant's given instructions, it is interesting to observe that included among them was the defendant's given instruction 23A, which read:
>
> " 'In determining the nature of any duty owed the plaintiff by the defendant, you should take into consideration the provisions of the evidence in this case on the subject of the rules and regulations of the Hospital Licensing Act of Illinois and the joint Commission on Accreditation of Hospitals and weigh these provisions along with all other evidence in the case to determine whether there was a duty upon the defendant to make a decision in the field of the practice of medicine.' "

Apparently, then, the Petitioner at the time of the trial and at the time of its first appeal regarded these

various provisions and regulations as binding upon it, and believed that the jury should make a determination as to the extent of the duty existing. Since both the Appellate Court and the trial court expressly passed upon these legal issues it cannot be said that this arose for the first time in the opinion of the Supreme Court. Interestingly enough, the Supreme Court did not announce any new ruling as to such jury instructions. Regarding the instructions tendered by the Petitioner upon this issue which had been refused by the trial court, the Supreme Court stated (App. 83, 84):

> "The defendant also argues that it was error to refuse to instruct the jury that only licensed physicians can practice medicine and that the customary standards of the community establish the duty of the hospital, and to give any instruction which indicated it was the duty of the Hospital to supervise the competence of its staff members. The trial court did not err in its ruling upon these matters."

Accordingly, the assertion by the Petitioner that a constitutional question was introduced for the first time by the decision of the Supreme Court of Illinois in such regard is, apparently, a result of absent-mindedness or carelessness in the extreme.

Even if there were a foundation for such statements, the assertions of Petitioner about requiring a corporation to practice medicine are not scholarly. Any State has a right to require a hospital to have some concern for the welfare of its patients. A State, under its police powers, has a right to require that there be a reasonable number of nurses qualified to recognize the danger signs of gangrene, and to notify their superiors when such signs are manifest. The Petitioner-Hospital undertook these responsibilities when it became licensed under the laws of Illinois and also when it became accredited under the rules of the Joint Commission. As a matter of fact,

the Petitioner in this case insisted that such Regulations and such Standards be introduced in their entirety in the trial court, and they were received as exhibits. These various rules and regulations require that there be a reasonable number of nurses competent to recognize the danger signs of gangrene; it is within the power of the licensing state also to require such nurses to notify their superiors when such signs are manifest. A State has a further right to require the hospital administration to bring awareness of such conditions to the attention of its Medical Staff so that a patient will not needlessly die, nor as here, have his leg rot away because of the incompetence of a person supplied by the medical staff on emergency duty. And a state may insist upon members of a surgical staff—such as those doing orthopedic work —meeting minimum standards of qualifications. This physician was held out by the defendant as qualified to do orthopedic surgery without supervision and to be rotated on emergency duty; yet this man did not even know the name of any text in the orthopedic field nor could he recall the name of any medical book upon any subject which he had read since 1928. The Medicare Act is in no way involved; nor could the enactment of such a statute inhibit State powers reserved under the Tenth Amendment. Clearly, it could not affect rights which had accrued to the respondent under the laws of Illinois prior to the passage of such statute.

The discussion of Illinois statutes at pages 8 and 9 of the Petition is equally irrelevant. Since the suit was not based uopn such statutes, it is immaterial what the provisions do or do not require or whether they would be violated by requiring nurses to use care to observe the changes in a patient's physical condition. It is exclusively a question for Illinois to construe and apply its own statutes unless it is contended that such statutes violate the Federal Constitution. That did not arise here. Neither party pleaded nor relied upon such statutes in the trial

court nor in the state reviewing courts, and reviewing courts are not required to consider defenses not pleaded. However, the general theory of the defendant to the effect that a hospital would be practicing medicine by requiring nurses to keep their eyes open was considered by the trial court and presented to the jury under a tendered instruction of the Petitioner with the jury resolving the issues adversely to the Petitioner.

In passing, we might say that it would be quite unfortunate if a hospital had no responsibility whatever to the patients upon its premises. A hospital is more than the bricks and mortar which constitute the building in which it is housed. It is an active operating entity responsible for the acts and neglects of its personnel. It operates laboratories, wherein a wrong blood type may be administered or X-ray burns may result. It screens and often trains the nurses whom it employs, and they are the servants of the hospital—not of the attending physician. Even though physicians ordinarily are not hospital employees, nevertheless the hospital has a right to determine their qualifications to perform the types of procedures in which they engage, and even to remove them from the medical staff if by reason of ill-health, drug addiction, or other causes they become incompetent to perform such procedures without danger to patients. In this case, both the hospital and the physician were strangers to the respondent, who was taken from the football playing field with a broken leg to the hospital in question where this physician was furnished as the man on emergency duty to perform any procedures necessary. Although the nurses knew that no padding was applied under the cast, that the exposed foot had turned dark and had become cold to the touch, the cast had become soaked with pus, and that there was a foul stench of rotting flesh, never did the hospital personnel bring this to the attention of the Chief of the Medical Staff or the Administrator. If this Petitioner feels that under the Medi-

care Act it will have no responsibility whatever under the regulations, rules, and standards applicable to hospitals, our senior citizens will be exposed to dangers they should not be required to face. However, such issue is not presented in this case.

As earlier stated, the question simply is whether it is or is not proper to impose liability as a result of misconduct or omissions on the part of a hospital. Such is determined by State law. This case is no more reviewable by this court than would be a suit involving an automobile collision occurring at an intersection in Illinois. If any Federal or constitutional questions had ever existed, they were not presented at the earliest opportunity and a waiver has resulted.

CONCLUSION.

For the foregoing reasons, the Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

DORRENCE KENNETH DARLING II,
A Minor, by His Father and Next Friend,
DORRENCE KENNETH DARLING
(Appellee), Respondent,

.....

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